Supreme Court, U.S.
FILED
JUN 22 1999
CLERK

No. 98-1884

In The

# Supreme Court of the United States

CEDRIC D. SIMMS,

*Petitioner,*

v.

THE STATE OF OKLAHOMA, *ex rel.*,
THE DEPARTMENT OF MENTAL HEALTH
AND SUBSTANCE ABUSE SERVICES,
A STATE AGENCY,

*Respondent.*

**On Petition For Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Tenth Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION

W. CRAIG SUTTER
*General Counsel*
PENNY BROUGHTON MCCRACKEN
*Deputy General Counsel*
Department of Mental Health and
Substance Abuse Services
(*Counsel of Record*)
1200 N.E. 13th
P.O. Box 53277
Oklahoma City, OK 73152-3277
(405) 522-3871

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

348P

TABLE OF CONTENTS

Page

OPINIONS AND JUDGMENT BELOW ..... 1

STATUTORY AND REGULATORY PROVISIONS INVOLVED ..... 1

STATEMENT OF THE CASE ..... 2

SUMMARY OF THE ARGUMENT ..... 6

ARGUMENT ..... 8

I. AMENDMENTS MAY RELATE BACK TO THE ORIGINAL DATE OF FILING IF THEY RELATE TO OR GROW OUT OF THE SUBJECT MATTER OF THE ORIGINAL CHARGE ..... 8

II. THIS CASE CONCERNS A VERY NARROW ISSUE THAT DOES NOT WARRANT SCRUTINY OF THE UNITED STATES SUPREME COURT ..... 11

III. PETITIONER HAS POINTED TO NO PERTINENT CASE LAW SUGGESTING A SPLIT IN THE CIRCUITS INVOLVING THE ISSUE OF WHETHER AMENDMENTS ALLEGING RETALIATION BASED ON EVENTS THAT TOOK PLACE PRIOR TO THE FILING OF THE ORIGINAL CHARGE RELATE BACK TO THE DATE OF THE ORIGINAL FILING ..... 17

IV. THE TENTH CIRCUIT DID NOT ADOPT A "HYPER-TECHNICAL" RULE INTERPRETING 29 CFR § 1601.12(b) ..... 25

CONCLUSION ..... 29

# TABLE OF AUTHORITIES

Page

CASES

*Adames v. Mitsubishi Bank, Ltd.*, 751 F.Supp. 1565 (E.D.N.Y. 1990) ..... 21, 22, 23

*Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 39 L.Ed.2d 147, 94 S.Ct. 1011 (1974) ..... 8

*Anderson v. Block*, 807 F.2d 145 (8th Cir. 1986) ..... 19

*Ang v. The Proctor and Gamble Co.*, 932 F.2d 540 (6th Cir. 1991) ..... 15, 24, 28

*Babrocky v. Jewel Food Co.*, 773 F.2d 857 (7th Cir. 1985) ..... 9

*Baker v. Buckeye Cellulose Corp.*, 856 F.2d 167 (11th Cir. 1988) ..... 13

*Bouman v. Block*, 940 F.2d 1211 (9th Cir. 1991), *cert. denied*, 502 U.S. 1005, 116 L.Ed.2d 658, 112 S.Ct. 640 (1991) ..... 12, 24

*Brown v. Hartshorne Public Sch. Dist. No. 1*, 864 F.2d 680 (10th Cir. 1988) ..... 14

*Carter v. South Cent. Bell*, 912 F.2d 832 (5th Cir. 1990), *cert. denied*, 501 U.S. 1260, 115 L.Ed.2d 1079, 111 S.Ct. 2916 (1991) ..... 13

*Cheek v. Western and Southern Life Insurance Co.*, 31 F.3d 497 (7th Cir. 1994) ..... 9, 27

*Chisholm v. United States Postal Serv.*, 665 F.2d 482 (4th Cir. 1981) ..... 10, 24

*Choate v. Caterpillar Tractor Co.*, 402 F.2d 357 (7th Cir. 1968) ..... 9

TABLE OF AUTHORITIES – Continued

Page

*Conroy v. Boston Edison Co.*, 758 F.Supp. 54 (D. Mass. 1991) ..... 21, 22

*Dent v. St. Louis-San Francisco Railway Co.*, 406 F.2ed 399 (5th Cir. 1969) ..... 9

*EEOC v. Bailey Co., Inc.*, 563 F.2d 439 (6th Cir. 1977), *cert. denied*, 435 U.S. 915, 98 S.Ct. 1468, 55 L.Ed.2d 506 (1978) ..... 8

*EEOC v. General Electric Co.*, 532 F.2d 359 (4th Cir. 1976) ..... 9

*Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954 (4th Cir. 1996) ..... 17, 18

*Fellows v. Universal Restaurants, Inc.*, 701 F.2d 447 (5th Cir. 1983), *cert. denied*, 429 U.S. 986, 107 S.Ct. 102, 78 L.Ed.2d 106 (1983) ..... 10

*Hicks v. ABT Associates*, 572 F.2d 960 (3rd Cir. 1978) ..... 19, 28

*Hill v. Western Electric Co.*, 672 F.2d 381 (4th Cir. 1982), *cert. denied*, 459 U.S. 981 (1982) ..... 8

*Hornsby v. Conoco, Inc.*, 777 F.2d 243 (5th Cir. 1985) ..... 19

*Jenkins v. Blue Cross Mut. Hosp. Ins., Inc.*, 538 F.2d 164 (7th Cir. 1976) (*en banc*), *cert. denied*, 429 U.S. 986, 97 S.Ct. 506, 50 L.Ed.2d 598 (1976) ..... 9

*Jones v. Runyon*, 91 F.3d 1398 (10th Cir. 1996) ..... 27

*Kirkland v. Buffalo Bd. of Educ.*, 622 F.2d 1066 (2nd Cir. 1980) ..... 10, 13

*Love v. Pullman Co.*, 404 U.S. 522, 30 L.Ed.2d 679, 92 S.Ct. 616 (1972) ..... 8

*Malarkey v. Texaco, Inc.*, 983 F.2d 1204 (2nd Cir. 1993) ..... 15

TABLE OF AUTHORITIES – Continued

Page

*McKenzie v. Illinois Dept. of Trans.*, 93 F.3d 473 (7th Cir. 1996) ..... 12, 13

*Nealon v. Stone*, 958 F.2d 584 (4th Cir. 1992) ..... 8

*O'Rourke v. Continental Casualty Co.*, 983 F.2d 94 (7th Cir. 1993) ..... 16

*Oatis v. Crown Zellerback Corp.*, 398 F.2d 496 (5th Cir. 1968) ..... 9

*Oubichion v. North American Rockwell Corp.*, 482 F.2d 569 (9th Cir. 1973) ..... 9

*Pejic v. Hughes Helicopters, Inc.*, 840 F.2d 667 (9th Cir. 1988) ..... 17, 18, 21

*Rush v. McDonald's Corporation*, 966 F.2d 1104 (7th Cir. 1992) ..... 8

*Satz v. ITT Fin. Corp.*, 619 F.2d 738 (8th Cir. 1980) ..... 10

*Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970) ..... 20, 21, 28

*Schnellbaecher v. Baskin Clothing Co.*, 887 F.2d 124 (7th Cir. 1989) ..... 8, 9

*Seymore v. Shawver & Sons, Inc.*, 111 F.3d 794, (10th Cir. 1997), *cert. denied*, 11 S.Ct. 342 (1997) ..... 14, 16, 24, 26

*Steffen v. Meridian Life Ins. Co.*, 859 F.2d 534 (7th Cir. 1988), *cert. denied*, 491 U.S. 907, 109 S.Ct. 3191, 105 L.Ed.2d 699 (1989) ..... 15

*Trevino-Barton v. Pittsburgh Nat. Bank*, 919 F.2d 874 (3rd Cir. 1990) ..... 8

*Waiters v. Parsons*, 729 F.2d 233 (3rd Cir. 1984) ..... 13

TABLE OF AUTHORITIES – Continued

Page

*Washington v. Kroger Co.*, 671 F.2d 1072 (8th Cir. 1982) ..... 20

*Zanders v. O'Gara-Hess*, 952 F.2d 404 (6th Cir. 1992) .... 19

*Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 71 L.Ed.2d 234, 102 S.Ct. 1127 (1982) ..... 9

STATUTES

42 U.S.C. § 2000e-5(e) and (f)(1) (1994)..... 8

REGULATIONS

29 CFR § 1601.12(b) ..... 10, 11, 25, 28

## RESPONDENT'S BRIEF IN OPPOSITION

## OPINIONS AND JUDGMENT BELOW

*Simms v. State of Oklahoma, ex rel., Department of Mental Health and Substance Abuse Services*, 165 F.3d 1321 (10th Cir. 1999).

*Simms v. State of Oklahoma, ex rel., Department of Mental Health and Substance Abuse Services*, Case No. CIV-96-2158-A, United States, District Court, Western District of Oklahoma, Judgment entered on September 3, 1997.

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.* 29 CFR § 1601.12(b):

> Notwithstanding the provisions of paragraph (a) of this section, a charge is deemed filed when the Commission receives from the person aggrieved a written statement sufficiently precise to identify the parties and to describe generally the action or practices complained of. A charge may be amended to cure technical defects or omissions, including failure to swear to the charge, or to clarify and amplify allegations made therein, and such amendments relate back to the original filing date. However, an amendment alleging additional acts constituting unlawful employment practices not directly related to or growing out of the subject matter of the original charge will be permitted only where at the date of the amendment the allegation

could have been timely filed as a separate charge.

## STATEMENT OF THE CASE

Petitioner, Cedric Simms, began working for Respondent, the Department of Mental Health and Substance Abuse Services, a state agency, on April 29, 1991. Petitioner's Petition p. 2a. On October 12, 1992, after being denied a promotion, Petitioner filed a Charge of Discrimination, Charge No. 311930053 ("Charge I") alleging he had been discriminated against because of his race. *Id.* On December 21, 1993 he filed a Title VII lawsuit (*"Simms I"*) in the United States District Court, Western District of Oklahoma. On April 13, 1994, a settlement was reached, wherein Petitioner was promoted to the position of Fire & Safety Officer II with Griffin Memorial Hospital, Norman, Oklahoma. He began his supervisory duties June 20, 1994. *Id.*

Ten days later, on June 30, 1994, Respondent posted a job announcement for the position of Fire and Safety Officer Supervisor. *Id.* The posting stated *"PREFERENCE WILL BE GIVEN TO APPLICANTS WITH SUPERVISORY EXPERIENCE."* *Id.* Petitioner applied for the position. *Id.* He and another candidate, a white male, were selected as the top two candidates after a first round of interviews. *Id.* Petitioner had a score of 1,866 out of 2,000, and the white male had a score of 1,835 out of 2,000, a 1.55% difference. *Id.* at 12a, n.4. A second interview was held to make the final selection and on August 15, 1994 the white male candidate, who had greater supervisory experience,

was chosen. *Id.* at 2a. Because he was not selected, on October 31, 1994, Petitioner filed a second Charge of Discrimination, Charge No. 311950136 ("Charge II") alleging he was discriminated against because of his race. In the section of the charge reading "The Particulars Are," Petitioner stated:

> I. Effective August 15, 1994, I was denied promotion to the position of Fire and Safety Officer Supervisor.
>
> II. Carol Kellison (Director Management Support Services) informed me by written notice that a better experienced candidate had been selected.
>
> III. I believe I have been discriminated against because of my race, Black, in violation of Title VII of the Civil Rights Act of 1964, as amended.

*Id.* at 29a.

In the section of Charge II reading "Date Discrimination Took Place," Petitioner listed August 15, 1994 as the "earliest" and "latest" date. *Id.* In the section reading "Cause of Discrimination Based On," Petitioner checked the box identified as "Race." *Id.* Petitioner did not check the box identified as "Retaliation" or allege any facts that would give rise to an inference that retaliation had taken place. *Id.* No mention of the previous EEOC charge or any other allegedly wrongful acts were made. *Id.*

On June 5, 1995, Petitioner filed a third charge of discrimination, Charge No. 311950898, ("Charge III"), contending various work-related disciplines imposed upon him were retaliation for having filed Charge II. *Id.*

at 3a. A right-to-sue letter on Charge III was issued by the Equal Employment Opportunity Commission ("EEOC") on November 29, 1995. *Id.* He brought a Title VII action in the federal district court of the Western District of Oklahoma on January 12, 1996, alleging race-based employment discrimination and retaliation, including allegations of retaliatory acts occurring prior to 1995 that were not covered by Charge III (*"Simms II"*). *Id.* At the time the suit was brought, he had not yet received a right to sue letter on Charge II. *Id.* On July 13, 1996, Respondent filed a motion for partial summary judgment in *Simms II* on the grounds Petitioner had failed to exhaust his administrative remedies as to the race discrimination and pre-1995 retaliation claims. *Id.*

Two days later, on July 15, 1996, Petitioner filed an amendment to Charge II, alleging pre-1995 acts of retaliation. In the section of the charge reading, "The Particulars Are," Petitioner stated:

> I. Beginning in May of 1994 and continuing until the present, I have had my supervisory duties with held from my fire and safety Officer II position in direct violation of a court order entered in a previous EEOC charge. Effective August 15, 1994, I was denied promotion to the position of Fire and Safety Officer Supervisor.
>
> II. The reasons given for withholding of supervisory duties and other disciplinary acts, I believe were pretextural. No other reason has been given for the withholding of supervisory duties. Carol Kellison (Director Management Support Services)

> informed me by written notice that a better experienced candidate had been selected.
>
> III. I believe I have been discriminated against because of my race, Black, and retaliated against for filing previous charges, and for objecting to unlawful employment practices, in violation of Title VII of the Civil Rights Act of 1964, as amended.

This charge has been amended to include retaliation, and the continuing violation. *Id.* at 31a.

In the section reading "Date Discrimination Took Place," Petitioner listed May 5, 1994 as the "earliest" and September 22, 1995 as the "latest" date. *Id.* Petitioner checked the boxes identified as "Retaliation" and "Race." *Id.*

On September 3, 1996, the district court in *Simms II* granted Respondent's motion for partial summary judgment leaving only the post-1995 retaliation claims for trial. *Id.* at 3a-4a. On September 25, 1996, the EEOC issued a right to sue on Charge II, and Petitioner filed this suit ("*Simms III*"). *Id.* at 4a. On January 6, 1997, Petitioner filed a motion to consolidate *Simms II* and *Simms III*. *Id.* The motion to consolidate was denied because at the time it was filed, *Simms II* was scheduled to begin jury trial in a week. *Id.*

On June 16, 1997, Respondent filed a motion for summary judgment in *Simms III* claiming Petitioner's pre-1995 retaliation claims were time-barred and did not relate back to Charge II, the underlying EEOC charge. *Id.* On September 3, 1997, the district court found Petitioner's amendment was neither timely or related to the

activities contained in Charge II. *Id.* The Order was appealed to the Tenth Circuit which, in a published opinion, held Petitioner had failed to exhaust his administrative remedies regarding the retaliation claims. *Id.* at 16a. Thereafter, it denied Petitioner's request for rehearing, leading to this Petition for Certiorari.

## SUMMARY OF THE ARGUMENT

The issues raised in this appeal touch on a very narrow issue that does not warrant the perusal of the United States Supreme Court. In Petitioner's Petition for Certiorari, Petitioners couch the Question Presented in terms far too broad for the facts of the case presented, as follows:

> Does an amendment to an EEOC charge of discrimination relate back to the date of the original charge of the purpose of complying with the statute of limitations for Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, where the amendment alleges an additional "legal theory" that grows out of the same set of operative facts that were in the original charge?

This case, with its odd fact pattern, turned on far more narrow grounds that do not give rise to the weighty considerations espoused by Petitioner. The only pertinent issue arising from this case for this court to consider is:

> Does an amendment to an EEOC charge of discrimination adding a new legal theory of retaliation based on facts that occurred prior to filing the original charge relate back to the date of the

> original charge of the purpose of complying with the statute of limitation for Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.*, ***when the original charge makes no reference to any facts that would demonstrate pre-filing retaliation, and when the EEOC complaint from which retaliation allegedly flowed is not before the Court?***

Due to the unique facts in this case, Petitioner has relied upon cases that are not on point and cannot be used to demonstrate a split in the Circuits.

Further, a careful reading of the Tenth Circuit Opinion does not support Petitioner's claim it has adopted a hyper-technical rule that erects improper procedural roadblocks which will compromise the purposes of Title VII. Because the Tenth Circuit examined what was alleged in Petitioner's original charge to determine whether the amendment reasonably related back to the date of the filing, it cannot be said its holding espouses a hyper-technical rule that will impermissibly undermine the laudable goals of Title VII. Further, Petitioner has provided this Court no caselaw interpreting the unique fact pattern of this case that contradicts the analysis of the Tenth Circuit or evidences a split in the Circuits.

## ARGUMENT

### I. AMENDMENTS MAY RELATE BACK TO THE ORIGINAL DATE OF FILING IF THEY RELATE TO OR GROW OUT OF THE SUBJECT MATTER OF THE ORIGINAL CHARGE.

Petitioner's claim he was disciplined in retaliation for having filed an EEOC charge in 1992 was dismissed because he failed to exhaust his administrative remedies. It is well settled that in order for federal courts to have subject matter jurisdiction of Title VII claims, the claimant must first unsuccessfully pursue administrative relief. *See* 42 U.S.C. § 2000e-5(e) and (f)(1) (1994); *See Love v. Pullman Co.*, 404 U.S. 522, 30 L.Ed.2d 679, 92 S.Ct. 616 (1972); *Rush v. McDonald's Corporation*, 966 F.2d 1104, 1110, n.20 (7th Cir. 1992); *Trevino-Barton v. Pittsburgh Nat. Bank*, 919 F.2d 874, 878 (3rd Cir. 1990).

Once a charge is made and a right to sue letter is issued, a plaintiff may bring suit in federal court. The scope of the complaint is limited to charges set forth in the EEOC charge. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47, 39 L.Ed.2d 147, 94 S.Ct. 1011 (1974). *Rush*, 966 F.2d at 1110 n.20; *Nealon v. Stone*, 958 F.2d 584, 590 (4th Cir. 1992); *Hill v. Western Electric Co.*, 672 F.2d 381, 390 n.6 (4th Cir. 1982) (quoting *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 466 (5th Cir. 1970)), *cert. denied*, 459 U.S. 981 (1982); *EEOC v. Bailey Co., Inc.*, 563 F.2d 439, 446 (6th Cir. 1977), *cert. denied*, 435 U.S. 915, 98 S.Ct. 1468, 55 L.Ed.2d 506 (1978) (The judicial complaint must be limited to the scope of the EEOC investigation reasonably expected to grow out of the charge of discrimination; *See also Schnellbaecher v. Baskin Clothing Co.*, 887 F.2d 124, 127

(7th Cir. 1989); *EEOC v. General Electric Co.*, 532 F.2d 359, 373 (4th Cir. 1976).

Although the rule is not jurisdictional, *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 392, 71 L.Ed.2d 234, 102 S.Ct. 1127 (1982), it is a condition precedent with which Title VII plaintiffs must comply. *Babrocky v. Jewel Food Co.*, 773 F.2d 857, 863-64 (7th Cir. 1985). Allowing a complaint to encompass allegations outside the ambit of the predicate EEOC charge would frustrate the EEOC's investigatory and conciliatory role, as well as deprive the charged party of notice of the charge. *Cheek v. Western and Southern Life Insurance Co.*, 31 F.3d 497, 500 (7th Cir. 1994).

When an employee seeks judicial relief for incidents not listed in his original charge to the EEOC, the judicial complaint nevertheless may encompass any discrimination like or reasonably related to the allegations of the EEOC charge, including new acts occurring during the pendency of the charge before the EEOC. *See Oubichion v. North American Rockwell Corp.*, 482 F.2d 569, 571 (9th Cir. 1973) (citing to *Danner v. Phillips Petroleum Co.*, 447 F.2d 159, 162 (5th Cir. 1971); *Tipler v. E.I. duPont deNemours & Co.*, 443 F.2d 125, 131 (6th Cir. 1971); *Sanchez*, 431 F.2d at 465-67; cf. *Macklin v. Spector Freight Systems, Inc.*, 156 U.S.App. D.C. 69, 478 F.2d 979 (D.C. Cir. 1973)) (emphasis added); *See also Schnellbaecher v. Baskin Clothing Co.*, 887 F.2d 124 (7th Cir. 1989); *Jenkins v. Blue Cross Mut. Hosp. Ins., Inc.*, 538 F.2d 164, 167 (7th Cir. 1976) (*en banc*), *cert. denied*, 429 U.S. 986, 97 S.Ct. 506, 50 L.Ed.2d 598 (1976); *Dent v. St. Louis-San Francisco Railway Co.*, 406 F.2d 399, 403 (5th Cir. 1969); *Choate v. Caterpillar Tractor Co.*, 402 F.2d 357, 359 (7th Cir. 1968); *Oatis v. Crown Zellerbach*

*Corp.*, 398 F.2d 496, 497-498 (5th Cir. 1968). *See, e.g., Fellows v. Universal Restaurants, Inc.*, 701 F.2d 447, 464 (5th Cir. 1983), *cert. denied*, 429 U.S. 986, 107 S.Ct. 102, 78 l.Ed.2d 106 (1983); *Chisholm v. United States Postal Serv.*, 665 F.2d 482, 491 (4th Cir. 1981); *Kirkland v. Buffalo Bd. Of Educ.*, 622 F.2d 1066, 1068 (2nd Cir. 1980); *Satz v. ITT Fin. Corp.*, 619 F.2d 738, 741 (8th Cir. 1980).

In Charge II, the underlying charge, Petitioner alleged only that he had been discriminated against on the basis of race. Petitioner's amendment included a new theory of retaliation and pre-filing acts he alleged were done in retaliation for filing Charge I. Proper amendments must meet the standards set forth in 29 CFR § 1601.12(b), which states as follows:

> Notwithstanding the provisions of paragraph (a) of this section, a charge is deemed filed when the Commission receives from the person aggrieved a written statement sufficiently precise to identify the parties and to describe generally the action or practices complained of. A charge may be amended to cure technical defects or omissions, including failure to swear to the charge, or to clarify and amplify allegations made therein, and such amendments relate back to the original filing date. However, an amendment alleging additional acts constituting unlawful employment practices not directly related to or growing out of the subject matter of the original charge will be permitted only where at the date of the amendment the allegation could have been timely filed as a separate charge.

The Tenth Circuit found the amendment did not reasonably relate to the original charge. Petitioner attempts to persuade this Court he was denied the right to bring

his retaliation claims because the Tenth Circuit took an overly narrow view of the EEOC regulation. This argument is without merit. An objective look at the facts of the case reveals he simply failed to set forth information in his original charge upon which to base a retaliation claim. The Tenth Circuit opinion turned on this issue rather than on a "hyper-technical" interpretation of 29 CFR § 1601.12(b).

## II. THIS CASE CONCERNS A VERY NARROW ISSUE THAT DOES NOT WARRANT SCRUTINY OF THE UNITED STATES SUPREME COURT

Petitioners couch the Question Presented in terms far too broad for the facts of the case presented, as follows:

> Does an amendment to an EEOC charge of discrimination relate back to the date of the original charge of the purpose of complying with the statute of limitations for Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, where the amendment alleges an additional "legal theory" that grows out of the same set of operative facts that were in the original charge?

This case turned on a far more narrow issue that does not give rise to the weighty considerations espoused by Petitioner. The only pertinent issue arising from this case was:

> Does an amendment to an EEOC charge of discrimination adding a new legal theory of retaliation based on facts that occurred prior to filing the original charge, relate back to the date of the original charge of the purpose of complying

with the statute of limitation for Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.*, ***when the original charge makes no reference to any facts that would demonstrate pre-filing retaliation, and when the EEOC charge from which retaliation allegedly flowed, is not before the Court?***

The bulk of Petitioner's Petition is based on his claim the Circuits are split on the issue of what standard to apply in determining whether amendments relate back to the date of the original charge. However, retaliation charges are comprised of fundamentally different elements than are discrimination claims, and only a comparison of similar cases is helpful in making such observation.

Actionable retaliation, by its very nature, is an act taken in reaction to the protected conduct of a plaintiff. *McKenzie v. Illinois Dept. of Trans.*, 93 F.3d 473 (7th Cir. 1996). Unless a plaintiff indicates in the original charge that he engaged in some protected conduct that led to the defendant's alleged retaliatory acts, there arises no reasonable inference that retaliation has taken place. Further, even a layperson would have no difficulty explaining this in plain language, *i.e.*, "I was fired because I filed an EEOC charge."

Petitioner makes no claim there is a dispute among the Circuits as to whether post-filing claims of retaliation relate back to the original date of filing, and indeed, the Circuits appear to be in agreement a plaintiff need not file additional charges for retaliatory acts that occur *after* the original charge is filed. *See Bouman v. Block*, 940 F.2d 1211

(9th Cir. 1991) (holding that retaliation claim was "reasonably related" to prior sex discrimination claim), *cert. denied*, 502 U.S. 1005, 116 L.Ed.2d 658, 112 S.Ct. 640 (1991); *Carter v. South Cent. Bell*, 912 F.2d 832 (5th Cir. 1990) (reasoning that because other Title VII claims were properly before court, jurisdiction existed over retaliatory termination claim as well), *cert. denied*, 501 U.S. 1260, 115 L.Ed.2d 1079, 111 S.Ct. 2916 (1991); *Baker v. Buckeye Cellulose Corp.*, 856 F.2d 167 (11th Cir. 1988); *Kirkland v. Buffalo Bd. Of Educ.*, 622 F.2d 1066 (2nd Cir. 1980) (holding that act of retaliation was "directly related" to plaintiff's initiation of litigation); *But see Waiters v. Parsons*, 729 F.2d 233, 237 n.10 (3rd Cir. 1984) (declining to adopt a "*per se* rule").

This position makes sense. As stated by the Court in *McKenzie v. Illinois Dept. of Trans.*, 92 F.3d 473 (7th Cir. 1996):

> It is the nature of retaliation claims that they arise after the filing of the EEOC charge. Requiring prior resort to the EEOC would mean that two charges would have to be filed in a retaliation case – a double filing that would serve no purpose except to create additional procedural technicalities when a single filing would compete with the intent of Title VII. We are reluctant to erect a needless procedural barrier to the private claimant under Title VII, especially since the EEOC relies largely upon the private lawsuit to obtain the goals of Title VII. Intertwined with the practical reason for our holding is a strong policy justification. Eliminating this needless procedural barrier will deter employers from

> attempting to discourage employees from exercising their rights under Title VII. (Citations omitted). *Id.* at 482.

The Circuits have had no difficulty finding retaliatory acts that occur after the original charge is filed relate back to the date of the original filing, including the Tenth Circuit. *See Seymore v. Shawver & Sons, Inc.*, 111 F.3d 794, 799 (10th Cir. 1997), *cert. denied*, 11 S.Ct. 342 (1997); *Brown v. Hartshorne Public Sch. Dist. No. 1*, 864 F.2d 680 (10th Cir. 1988) (holding that retaliation arising out of first EEOC filing was "reasonably related" to that filing, obviating the need for a second EEOC charge). These cases addressing retaliation charges directly contradict Petitioner's claim the Tenth Circuit has a rigid approach to allowing the relation back of amendments to the date of the original charge.

However, in all the cases listed that held the amendment related back, the alleged retaliatory acts occurred as a result of filing the ***underlying*** EEOC charge. In other words, the alleged retaliatory acts took place after the filing of the underlying charge and during its pendency. The sticking point in this case is that the alleged retaliatory acts did ***not*** occur as a result of the filing of the underlying charge or during its pendency. Instead, in his amendment, Petitioner tried to add a claim of retaliation based on facts that allegedly occurred before he filed the underlying charge, notwithstanding that he did not so much as hint at them in Charge II. The Circuits that have faced this issue have not been willing to find such acts to be reasonably related to the original charge, and Petitioner has pointed to *no* cases in support of such proposition, much less a split in the Circuits.

For example, in *Malarkey v. Texaco, Inc.*, 983 F.2d 1204 (2nd Cir. 1993), the plaintiff asked the Second Circuit to rule all retaliation claims are *per se* reasonably related. The court declined the plaintiff's request. The court noted "the reasonable related rule has been broadly construed to allow judicial redress for most retaliatory acts arising *subsequent* to an [Equal Employment Opportunity Commission] filing." *Id.* at 1209 (emphasis added). In order to be reasonably related to the Equal Employment Opportunity Commission complaint, the court stated "the rule is that a claim must arise only *after* the . . . complaint has been filed." *Id.* (emphasis added).

Likewise, in *Ang v. The Proctor and Gamble Co.*, 932 F.2d 540 (6th Cir. 1991), the plaintiff alleged Proctor and Gamble fired him in retaliation for his demand that they study the differential treatment of minority Ph.D.'s at the company. The conduct occurred prior to the filing of the EEOC charges and thus could have been alleged in the original charge. The Sixth Circuit held that retaliatory conduct occurring *prior* to the filing of the EEOC complaint is distinguishable from conduct occurring afterwards and that it did not meet the criteria to relate back. *Id.* at 546. The amendment was not allowed.

In *Steffen v. Meridian Life Ins. Co.*, 859 F.2d 534, 545 n.2 (7th Cir. 1988), *cert. denied*, 491 U.S. 907, 109 S.Ct. 3191, 105 L.Ed.2d 699 (1989), the plaintiff brought claims based on age discrimination and retaliation. The Seventh Circuit acknowledged a number of cases have allowed retaliatory discharge claims to proceed even though the underlying charge did not mention retaliation. However, it recognized retaliation that allegedly occurred *prior* to the filing of the original charge was an entirely different situation.

In discussing post-filing retaliation claims, the Seventh Circuit held:

> These cases are distinguishable from the present case where the alleged retaliatory acts occurred before Steffen's December 1, 1983 charge of discrimination was filed and Meridian was not given clear notice that retaliation was at issue. *Id.* at 545 n.2 (emphasis added).

*See also O'Rourke v. Continental Casualty Co.*, 983 F.2d 94 (7th Cir. 1993) (pre-filing retaliatory acts not alleged in the original charge disallowed).

In *Seymore v. Shawver & Sons, Inc.*, 111 F.3d 794 (10th Cir. 1997), the Tenth Circuit articulated a well reasoned position concerning whether alleged retaliatory acts that took place prior to the original charge, but were not mentioned, may relate back to the original date via an amendment. In *Seymore*, the plaintiff filed a complaint alleging race and sex discrimination with the Oklahoma Human Rights Commission prior to her termination. She then filed a separate charge with the EEOC five days after she was terminated. The Court held Ms. Seymore was aware of her retaliation claim at that time, and had the opportunity to assert that claim on her EEOC charge, thus giving defendants notice of the claim and providing the EEOC the opportunity to attempt to conciliate the claim. Because the complaint was filed after her termination, the Court held the defendants, as well as the EEOC, were entitled to presume Ms. Seymore was only asserting claims for race and sex discrimination. The Court addressed the policy issues involved in such a factual situation. It held:

> If we were to allow Ms. Seymore to rely on her earlier Human Rights' Commission complaint to assert a claim or retaliation, we would be acting in blatant disregard of the dual purposes of the Equal Employment Opportunity Commission charge requirement. *Id.* at 800.

Due to the unique facts in this case, Petitioner has relied upon cases that are not on point and cannot be used to demonstrate a split in the Circuits.

## III. PETITIONER HAS POINTED TO NO PERTINENT CASE LAW SUGGESTING A SPLIT IN THE CIRCUITS INVOLVING THE ISSUE OF WHETHER AMENDMENTS ALLEGING RETALIATION BASED ON EVENTS THAT TOOK PLACE PRIOR TO THE FILING OF THE ORIGINAL CHARGE RELATE BACK TO THE DATE OF THE ORIGINAL FILING

Petitioner claims the Circuits are split on the issue of what standard to apply in determining if amendments relate back to the original filing. He claims his Petition for writ of certiorari should be granted because the decision below "directly and irreconcilably conflicts with the rulings of several other Circuits as well as the applicable decisions of this Court." Petitioner's Petition p. 8. He claims the Tenth, Fourth and Ninth Circuits have concluded an amendment will not relate back if it advances a new theory of recovery regardless of what facts were included in the original charge, citing to this case; *Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 963 (4th Cir. 1996); and *Pejic v. Hughes Helicopters, Inc.*, 840 F.2d 667, 675 (9th Cir. 1988). In contrast, Petitioner claims the Third, Fifth, Sixth and Eighth Circuits have taken a

more flexible approach to the regulation and have held the language of the regulation allows amendments based on different legal theories that derive from the same set of operative facts included in the original charge. The cases relied upon by Petitioner are factually different from this case, rendering them inapplicable.

In both the *Evans* and *Pejic* cases, the courts refused to allow amendments alleging new legal theories to relate back to the time of the original filings. In *Evans*, the plaintiff attempted to add a sex discrimination claim to the original charge of age discrimination. In *Pejic*, the plaintiff attempted to add an age discrimination claim to the original charge of discrimination based on national origin. In essence, both courts held that because the different legal theories arose from different statutory schemes they did not relate back to the original charge. "Title VII and ADEA claims arise from entirely different statutory schemes." *Pejic*, 840 F.2d at 675. *See also Evans*, 80 F.3d at 963.

These cases need not stand for the proposition that the courts need only look to the original legal theory alleged in the underlying charge. Clearly, the courts looked to the substance and facts provided in the original charge in determining whether the amendment related back to the date of the original filing, the result, notwithstanding. There is nothing to suggest in either of these cases that the courts would have hesitated to allow the amendments had there been a factual hint in the original filings that other legal theories were a possibility. As stated previously, defendants are entitled to notice.

The other cases cited by Petitioner are also not on point. In *Hicks v. ABT Associates*, 572 F.2d 960 (3rd Cir. 1978), the Court reversed a summary judgment because there was a question of material fact as to whether the EEOC had improperly refused to allow the plaintiff to amend his complaint to add sex discrimination during the statutory period allowed b statute. *Zanders v. O'Gara-Hess*, 952 F.2d 404 (6th Cir. 1992), 1992 U.S. App. Lexis 535 should not be relied upon because it is not a published opinion. In *Anderson v. Block*, 807 F.2d 145 (8th Cir. 1986) the Court addressed an amendment related to *post filing* conduct. The Court held, "In addition, while the length of time during which a plaintiff may bring suit based on *post filing* conduct will be limited only by the promptness with which administrative proceedings on the initial charges are concluded, we see no unfairness in thus preserving the right to a judicial determination throughout the period during which the post charge incident could be subject to administrative investigation and resolution." *Id.* at 148. (emphasis added). Because this case does not concern post filing conduct, *Anderson* is not on point.

In *Hornsby v. Conoco, Inc.*, 777 F.2d 243 (5th Cir. 1985), the plaintiff clearly wrote in the factual circumstances related to sex discrimination so that amending the charge later was not troublesome. In that case, the plaintiff checked the box marked "other" and wrote in "age and retaliation." In the body of her statement she wrote she had told a supervisor that unless she was promoted, she would go to the EEOC because she felt she was being discriminated against because of her sex. *Id.* at 244. In contrast, in this case Petitioner set forth no factual basis

to support the retaliation claim based on pre-filing conduct.

In *Washington v. Kroger Co.*, 671 F.2d 1072 (8th Cir. 1982), the Court allowed a second charge to serve as an amendment of the first, but the substance of the second charge was based on acts that occurred *after* the filing of the first charge and were also alleged in the first charge. The Court stated:

> But plaintiff's claim of denial of opportunity to perform "checker" duties appears in her original charge filed with the EEOC . . . reappears in the complaint filed three and a half months later with the Missouri Department of Human Relations, . . . and is also contained in the second charge of discrimination filed with the EEOC on July 6, 1973. . . . This claim alleges facts that suggest a violation of Title VII continuing at least until the date plaintiff filed her complaint with the Department of Human Relations." *Id.* at 1075-76.

In contrast, Petitioner did not set forth a factual basis for the retaliation claim, nor did he suggest in his Petition how the facts in his original charge were broad enough to include the retaliation claims.

In *Sanchez v. Standard Brands, Inc.*, 431 F.2d 458 (5th Cir. 1970), the plaintiff originally checked "sex" to indicate what form of discrimination she was alleging. She included a number of facts including being struck by her supervisor, and not being paid when she injured her thumb at work. *Id.* at 458. Later, she amended the charge to include facts amplifying the original description, and alleged both sex discrimination and discrimination based on national origin. *Id.* at 459. The Court held the factual

statements were sufficiently broad enough to support a charge of discrimination based on national origin and allowed the charge to be amended. *Sanchez* is easily distinguished from this case. In addition to not including retaliation as the proper legal theory, Petitioner failed to include any essential factual details that would give a reasonable EEOC investigator and the plaintiff's employer notice that retaliation was included in the charge. Retaliation is not synonymous with discrimination.

Petitioner also relies upon two district court cases, *Conroy v. Boston Edison Co.*, 758 F.Supp. 54 (D. Mass. 1991) and *Adames v. Mitsubishi Bank, Ltd.*, 751 F.Supp. 1565 (E.D.N.Y. 1990), to support his position. It is interesting that Petitioner would rely upon *Conroy* because in that case, the Court refused to allow the plaintiff to amend her original charge of sex discrimination to include age discrimination. The Court adopted the reasoning found in *Pejic*, 840 F.2d 667 (9th Cir. 1988) and held the plaintiff's amendment did not clarify or amplify the earlier charge of sex discrimination. *Id.* at 59. Further, the Court held that a reasonable investigation of sex discrimination would have focused upon whether plaintiff was discharged on account of her sex rather than her age. *Id.*

Likewise, a reasonable investigation of Petitioner's original charge would have looked to see if he had been denied a promotion because of his race. Nothing in the original charge would have alerted a reasonable investigator to go back in time to determine whether there had been previous EEOC filings that could possibly reveal a retaliatory motive for the failure to promote. Under Petitioner's theory, an investigator could look back in time

over a period of decades searching the history of the parties to determine if the Petitioner had *ever* engaged in protected activity. If any were found, even though it was not mentioned in the filing, the Petitioner would be allowed to amend the charge to include retaliation. Petitioner points to no caselaw and offers no argument to support such an unfair and absurd proposition.

Petitioner claims "the rule adopted by the Tenth Circuit undermines the administrative scheme adopted by Congress [to place the charged party on notice of alleged violations and to give the EEOC sufficient information to investigate, and to provide the parties an opportunity to conciliate]" Petitioner's Petition p. 16. However, Respondent asserts allowing amendments to encompass acts and theories that took place prior to the original filings serves to undermine these very goals.

The Court should consider the amendment was not even filed until after Respondent filed a motion for partial summary judgment. Petitioner's Petition p. 3a. The amendment in question was filed long after Petitioner had obtained counsel. The Court should discourage the use of amendments as mere trial tactics to avoid the statutory constraints of the statute. *See e.g. Conroy*, 758 F.Supp. at 58 (Courts have looked at the timing of the amendment, and have said that where the filing of the amendment closely precedes the filing of the federal court action, it is likely an attempt to avoid the filing requirements) (cites omitted)).

The *Adames* case is also not on point. In *Adames*, the plaintiff originally alleged sex and national origin discrimination. She later attempted to amend the charge to

include a class-wide discrimination claim based on race and color. *Adames*, 751 F.Supp. at 1568. The Court found the original filing did not put the defendants on notice and that the amendment covered a much more extensive time frame than did the original filing. Accordingly, the amendment was not allowed. *Id.*

Likewise, Petitioner's amendment is far broader than was the original charge, and did not reasonably serve to place Respondent on notice of additional issues. The original charge was limited to race discrimination for failure to promote. In contrast, the proposed amendment attempted to add "withholding of supervisory duties" and retaliation for "filing previous charges, and for objecting to unlawful practices." The original charge was based on the events of one day, August 15, 1994. The amendment expended this time frame from the earliest date May 1, 1994 to the latest date September 22, 1995. Petitioner's Petition p. 31a. Allowing such amendment would have been improper.

In claiming the Circuits are split because they have selected different legal standards to determine whether amendments relate back to the original charge, Petitioner attempts to prove too much. Such a conclusion can not be drawn without comparing the factual circumstances of the relevant opinions. As set forth herein, a review of the relevant Circuit opinions indicates they regularly find amendments alleging retaliatory acts that take place ***post-filing*** relate back to the original charge. However, they are not likely to hold that amendments setting forth alleged retaliatory acts that took place ***prior*** to filing the original charge relate back.

Petitioner has made broad sweeping claims that the Tenth, Fourth and Ninth Circuits have unduly restrictive rules on relation back of amendments. Yet all three of these Circuits have adopted rules allowing retaliation claims arising during the pendency of the underlying claim to be part of a subsequent lawsuit. *See Bouman*, 40 F.2d 1211 (9th Cir. 1991), *cert. denied*, 502 U.S. 1005, 116 L.Ed.2d 658, 112 S.Ct. 640 (holding that retaliation claim was "reasonably related" to prior sex discrimination claim); *Chisholm*, 665 F.2d 482, 491 (4th Cir. 1981); *Seymore*, 111 F.3d 794 (10th Cir. 1997). These cases aptly demonstrate the analysis contained in Petitioner's Petition is flawed because it does not address issues on point to this case.

In addition, Petitioner has claimed on page 14 of his Petition that " . . . [h]ad the petitioner been in one of the Circuits allowing amendment alleging additional legal claims to relate back when the amendment flows from the same facts as in the original charge, he would have had the opportunity to present his retaliation claims to a jury." Presumably Petitioner is referring to the Third, Fifth, Sixth and Eighth Circuits which he alleges have a flexible approach to the relation back doctrine. *See* Petitioner's Petition p. 11. Yet in *Ang v. The Proctor and Gamble Co*, 932 F.2d 540 (6th Cir. 1991), a case with a fact pattern similar to this case, the Sixth Circuit rendered the same decision as did the Tenth Circuit. Because the Third, Fifth and Seventh Circuits have not published conflicting opinions on point, no conclusion can be drawn as to whether there is diversity among the Circuits. Because these types of cases are so fact-driven, Petitioner could not show a

split in the Circuits unless he limited discussion to cases that were factually similar. He has not done so.

## IV. THE TENTH CIRCUIT DID NOT ADOPT A "HYPER-TECHNICAL" RULE INTERPRETING 29 CFR § 1601.12(b).

Petitioner claims the Tenth Circuit improperly affirmed the judgment of the district court by adopting a "hyper-technical" rule that turned on the legal theory alleged in the original filing. He claims:

> The Tenth Circuit's decision would allow amendments to relate back only if those amendments clarify legal theories already articulated in the original charge. (App 8a.) The result is a blanket rule prohibiting amendments alleging new legal claims even when those claims are 'related or grow [ ] out of the subject matter of the original charge. (App 6a).' Petitioner's Petition pp 9-10.

In support, he quotes from the Tenth Circuit Opinion as follows:

> . . . [W]e hold that Mr. Simms' retaliation charge does not relate back under § 1601.12(b) because his 1996 amendment alleges a new theory of recovery, retaliation, that he did not raise in the second EEOC charge.

Standing alone, this passage could possibly be interpreted as Petitioner has suggested. However, Respondent respectfully suggests these statements have been taken out of the proper context of the entire opinion. For example, Petitioner does not apprise the Court that in the very

next paragraph of the Opinion, the Court continues its analysis as follows:

> Even though Mr. Simms did not properly exhaust administrative remedies, ***our inquiry as to whether this court may hear the retaliation claims has not come to an end.*** This court has adopted a limited exception to the exhaustion rule for Title VII claims when the unexhausted claim is for "discrimination like or reasonably related to the allegations of the EEOC charge." *Ingels*, 42 F.3d at 625 (*quoting Brown v. Hartshorne Pub. Sch,. Dist. No. 1*, 864, F.2d 680, 682 (10th cir. [sic] 1988)). . . .

Petitioner's Petition p. 8a. (emphasis added).

The Tenth Circuit, relying heavily on *Seymore v. Shawver & Sons, Inc.*, 111 F.3d 794 (10th Cir. 1997), then went on to discuss the exception concerning retaliatory acts, including an analysis of other cases with similar facts.

In the underlying charge, Petitioner made absolutely no reference to the fact that he had previously filed Charge I, nor did he claim he had not been promoted because he had engaged in any protected activity. He listed the date of the occurrence giving rise to Charge II as beginning and ending on August 15, 1994, the date he was denied a promotion. He listed his race, black, as the reasons he believed he was being discriminated against. Absolutely nothing set forth in the original charge would suggest he was alleging retaliation. Accordingly, applying the reasoning in *Seymore*, the amendment was deemed to not relate back to the date of the original filing.

Petitioner has claimed this case turned on whether the proper legal theory was checked off in the boxes

denoting race, age, retaliation, etc. He claims "In this case, Mr. Simms' failure to check the "retaliation" box had the consequence, in the opinion of the court below, of completely cutting off his right to bring his retaliation claims before a court even though they were investigated and unsuccessfully conciliated by the EEOC." Petitioner's Petition pp. 17-18. Such statement is not accurate. It was not until it had addressed the actual facts of the case, including the factual description of the events contained in the original charge, that the Tenth Circuit affirmed the finding of the district court.

This is the typical manner employed by the Tenth Circuit in determining if amendments relate back to the date of the original filing. In *Jones v. Runyon*, 91 F.3d 1398 (10th Cir. 1996) the Tenth Circuit held:

> When an employee seeks judicial relief for incidents not listed in his original charge to the EEOC, the judicial complaint nevertheless may encompass any discrimination like or reasonably related to the allegations of the EEOC charge. . . . *Ingels v. Thiokol Corp.*, 42 F.3d 616, 625 (10th Cir. 1994) (quotations omitted). Therefore, we examine both [the plaintiff's] original charge to the EEOC and her federal court complaint to determine whether the issues she raised to the district court were both new and unrelated to her EEOC charges, thus defeating the court's jurisdiction over her action). *Id.* at 1400.

In reviewing the cases, discussion concerning whether the appropriate box denoting what legal theory was checked appears frequently, but comprises only one factor addressed. *See e.g. Cheek*, 31 F.3d 497 (7th Cir. 1994);

*Ang*, 932 F.2d 540 (6th Cir. 1991); *Hicks*, 672 F.2d 960 (3rd Cir. 1977); *Sanchez*, 431 F.2d 455 (5th Cir. 1970). In cases such as these, it is much more likely than not the plaintiff neglected to check the appropriate box, else the defendant-employer would not believe he had grounds to contest the amendment. That the Tenth Circuit addressed this issue before continuing to discuss whether the amendment set forth information that was reasonably related to the facts alleged in the original charge was certainly not error. Had the Tenth Circuit failed to continue the analysis of determining whether the amendment was reasonably related to the original charge, such omission might have been inappropriate, but this is not an issue in this case.

Although Petitioner has argued the Tenth Circuit adopted a hyper-technical rule that circumvents the purposes of Title VII, a review of the opinion indicates its decision to affirm the district court complies fully with 29 CFR § 1601.12(b) and properly balances the competing interests of plaintiffs, defendants and the EEOC.

## CONCLUSION

For all the reasons contained herein, the Tenth Circuit properly affirmed the district court order. Further, there exists no split in the Circuits on the pertinent issues in this case to warrant acceptance of certiorari by this Court.

Respectfully submitted this 22 day of June, 1999.

CRAIG SUTTER
General Counsel
PENNY BROUGHTON MCCRACKEN
Deputy General Counsel
Department of Mental Health
and Substance Abuse Services
1200 N.E. 13th Street
Post Office Box 53277
Oklahoma City, OK 73152-3277
(405) 522-3871

*Counsel for Respondent*